

CalMat Company and Building Material Construction, Industrial Professional and Technical Teamsters, Local Union #36, affiliated with the International Brotherhood of Teamsters, AFL-CIO. Case 21-CA-31793

August 20, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On February 11, 1998, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

David Mori, Esq., for the General Counsel.

James Zapp, Esq. and Mark Budensiek, Esq., (*Paul, Hastings, Janofsky & Walker*), of Los Angeles, California, for the Respondent.

C. A. Stillwagen, Business Representative, of San Diego, California, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in San Diego, California, on December 15 and 16, 1997. The charge was filed on January 7, 1997, by Building Material Construction, Industrial Professional and Technical Teamsters, Local Union #36, affiliated with the International Brotherhood of Teamsters AFL-CIO (the Union) and an amended charge was filed by the Union on January 23, 1997. On July 16, 1997, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations by CalMat Company (the Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent, in its answer to the complaint, denies that it has violated the Act as alleged.

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In adopting the judge's conclusion that the Respondent did not violate Sec. 8(a)(3) and (1) by refusing to reinstate striking employee Rodney Andrews, we find it unnecessary to rely on the judge's assumptions about the truck driver's perceptions during the events at issue.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel) and counsel for the Respondent. On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the processing and sale of rock and gravel and related products with its principal place of business located in San Diego, California. In the course and conduct of its business operations the Respondent annually purchases and receives at its San Diego facility goods or services valued in excess of \$50,000 directly from points outside the State of California. It is admitted and I find that the Respondent is engaged in commerce or in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The principal issues raised by the pleadings are whether the Respondent has violated Section 8(a)(3) and (1) of the Act by discharging one employee and by taking other disciplinary action against another retired employee because of conduct they engaged in during the course of an economic strike and picketing at the Respondent's premises.

B. The Facts

Robert Germann is the Union's shop steward and was picket captain during the economic strike and picketing which occurred from approximately January 3 to 19, 1997,¹ at the Respondent's premises. The picketing took place on a public thoroughfare adjoining the driveway to the Respondent's premises, from which large cement trucks and other similar vehicles would enter and leave the facility. The pickets would walk back and forth on this public road, crossing the Respondent's driveway directly in the path of the traffic entering and leaving the Respondent's plant.

The Respondent had employed the services of a private security firm to monitor the situation at the picketing site, and Germann testified that as picket captain he and his counterpart, Steve Harrington, the supervisor and liaison for the security firm, agreed on certain ground rules pertaining to the safety of the Respondent's property and all individuals in or around the picketing site. In addition, city police officers frequently monitored the site, and the officers made it clear to representatives of both the Union and the Respondent that the police would not tolerate any "shenanigans" from either side, and would be quick to make an example of anybody who engaged in any type of unsafe or improper conduct.

¹ All dates or time periods are within 1997 unless otherwise indicated.

It was understood that the pickets were not to set foot on the Respondent's driveway or otherwise cross the Respondent's imaginary property line; however, as trucks approached or exited from the driveway, Harrington and his security guards were permitted to walk from the Respondent's property into the public street where the pickets were located for the purpose of clearing a path for trucks proceeding through the picket line. Since trucks were entering and leaving the Respondent's premises almost continually, Harrington and his fellow security officers were engaged in this endeavor on nearly a full-time basis. The purpose of this "traffic control" was twofold: first, to clear a pathway through the picket line by interrupting the flow of the picketing across the pathway of the vehicles, and second, to insure the safety of the pickets, truck drivers, or anyone else in or around the property. Thus, as videos of each truck entering and exiting the premises demonstrated,² the pickets would, in effect, form a wall or barrier in front of each entering or exiting truck in order to stop it or slow it down as much as possible, and this wall of pickets would remain stationary until Harrington and his fellow security guards would approach the picket line, position themselves about a truck's width apart, and, as the pickets moved to either side, signal the truck to proceed through the picket line. Additionally, when trucks exited from the driveway, Harrington and other security guards would assume positions as front and side escorts and "walk" the truck through the picket line as it moved at idle speed.³

Germann testified that on January 10, he happened to be away from the picket line for about 15 minutes and on his return he was advised that one of the pickets, Rodney Andrews, had been hit by a truck as it was exiting the premises. Germann approached Harrington to ask him what had happened, and Harrington told him, "the [picket] wouldn't stop, he wasn't following my directions and I had to pull him out of the way [of the truck], and when I pulled him out of the way he didn't understand that and he got mad, and then I let him go and he jumped on the truck and I had to pull him down again."

Rodney Andrews was employed by the Respondent as a mixer driver from June 14, 1995, until February 7, 1997, when he was discharged for the foregoing alleged strike misconduct. Andrews testified that while he was picketing on January 10, he was grazed by a cab-over tractor hauling a 45-foot-long trailer as it exited the premises. Andrews gave the following account of the incident. The driver of the truck "paused for a second" at the stop sign located on the Respondent's premises, about 15 feet from the end of the driveway, and then, pursuant to the hand signal of the security guard, continued to proceed slowly, at about 3 miles per hour, toward the picket line. Andrews testified that he had not yet walked in front of the truck when he saw it approaching. He increased his pace so as to intentionally walk in the path of the truck "to slow the truck down," as the pickets had been instructed by Shop Steward/Picket Captain Germann that, "we can slow the truck down as far as production." However, all of the other pickets had stopped in or

der to clear a path for the truck which Harrington had waived on through.⁴

Andrews said that the reason he continued walking across the path of the truck is because he observed Harrington signaling the driver to stop. However, the driver did not stop, and just as Andrews was about to clear the far side of the truck its bumper "rubbed against" his right leg and, as he turned to the right, hit his left knee. Andrews explained that he was unable to jump out of the way because his knee was "just numbed up," and to protect himself he turned his back to the front of the truck and leaned against the grill as he shuffled his feet forward to prevent himself from falling while the truck continued pushing him forward at idle speed (variously estimated by witnesses to be approximately 1 to 3 miles per hour) about 10 or 15 feet. He heard Harrington yelling for the truck driver to stop, but the truck did not stop. Then Harrington grabbed Andrews, pulling him from in front of the truck toward the side, and then releasing him. Andrews became very upset, believing that the truck driver had intentionally tried to hit him and, still holding his picket sign, hit the driver's side window with it while he simultaneously grabbed the driver's side door handle of the truck with his free hand, opening the door and pulling himself up on the running board. At this point Harrington pulled him down from the truck.⁵ Then the truck, which had come to a stop during this brief interlude, continued across the intersection. Thereupon, Andrews evaded Harrington's grasp and, as he testified, "broke for the truck again." He ran after it and again jumped on the running board, grabbing the side mirror. He was again pulled from the truck.⁶

Then, according to Andrews, a police officer came over and "hit me with some keys." Andrews exclaimed that the truck had hit him, and the police officer said that Andrews was letting his emotions get in the way. He was instructed to sit in the back of the police car to "cool off" for awhile. After about 15 minutes he was released by the police officers. He then prepared and signed a handwritten account of the incident, apparently for his own purposes, which states, *inter alia*, as follows:⁷

I was picketing walking across [the] street at [the] back gate of Calmat. Then when one of the *Corona Transport* [trucks] approached the back gate he did not stop at [the] stop sign. The security [guards] jumped in front and sides of [the] truck to keep people from stopping [the] truck. But we are allowed to walk across [the] walk way to picket. And as I was walking across the driver didn't slow up or stop when security was yelling at him, so I turned my back and started running forward while security [was] telling this guy to stop, and then I turned to get out [of] his way because I thought he was trying to kill me or

² The security firm had a video camera set up on a tripod on the Respondent's premises, and videotaped each entering and exiting truck, as well as other picket line activity.

³ As depicted on the videotape, the pickets would move laterally to each side of the truck, stop within inches of the sides of the truck, hold up their picket signs and yell obscenities and other epithets, and blow whistles at the truck driver while the truck proceeded slowly through the gauntlet.

⁴ The lower edge of the windshield of the cab-over tractor truck was some 6 or 7 feet from the ground and, with all the noise created by the pickets and their whistles, it was obviously difficult for the driver, who had his window closed, to hear anything. Thus, he was responding to Harrington's hand signal, indicating that he should proceed. Further, as the truck was proceeding across the picket line at the same time as it was entering a public thoroughfare, the driver was obviously preoccupied with looking out for oncoming traffic.

⁵ In fact, as Andrews was pulled from the truck, he continued to hold on to the door handle, and it was sheared off and fell to the ground.

⁶ Andrews maintains that a security guard pulled him from the truck the second time, whereas the Respondent maintains that two police officers pulled him from the truck on this second occasion.

⁷ This statement has been edited for spelling and grammar.

something, so I got very upset and tried to get him out of the truck.

Officer (Sean Bannan #5219) & (Joe Winney #2735)

Stretch [Harrington]—Guard who saw [the incident]

After preparing and signing the aforementioned statement Andrews immediately returned to the picket line and continued his picketing activity. He picketed for about another hour before going to a medical center where an x-ray of his knee indicated that he had sustained no damage. He thereafter returned to the picket line and continued picketing for several more hours that day.

Because of this incident the Respondent did not permit Andrews to return to work at the end of the strike. On January 28 Andrews attended a meeting between management and union officials, during which Andrews explained his version of the incident and maintained that he had been angry with the truck driver for hitting him and had intended to “get the guy out of the truck” rather than standing on the other side of the road some forty feet or so in front of the truck as it exited the Respondent’s driveway. Austin testified that he happened to be looking toward the truck and the pickets at the time, and observed that the security guards on each side of the truck stopped the flow of pickets, and motioned for the truck to pass through the picket line. As the truck moved slowly forward, Austin saw Andrews walking in front of the truck and observed that Harrington, who was facing the truck and could not see Andrews walking behind him, kept motioning for the truck to continue through the picket line. When the security guards saw Andrews they started hollering to the truck driver and Harrington held up his fist, the standard signal for the driver to stop. However, the driver did not stop and kept on rolling forward. Then, according to Austin, he observed that the truck “come up against” Andrews’ left side. Andrews then turned around with his back to the grill of the truck and was pushed along for some 25 feet or so. Austin observed that Harrington grabbed Andrews and was pulling him from in front of the truck at the same time as he was holding up his fist indicating for the driver to stop. As Andrews was pulled from in front of the truck and was out of its path he ducked underneath Harrington’s hold. At that point the truck had pretty much come to a stop, and Andrews got up on the running board of the truck and slapped the window or the door. There was a struggle, as Andrews was resisting the efforts of the security guards who finally succeeded in pulling him off the truck.

Dennis Bowman has been employed by the Respondent for over 27 years. Bowman testified that he was walking across the street next to Andrews when the incident happened. Bowman testified that the other pickets had been stopped by the security guards to make way for the truck, but that he and Andrews did not stop. Both were in about the center of the grill of the truck and Andrews was about “a stride or so” in front of him when Bowman realized that the truck wasn’t going to stop. Therefore, aware of the danger, he did not continue across but rather stopped and retraced his steps in order to move out of the way. However Andrews continued crossing in the path of the truck. Then, according to Bowman, he saw the truck make contact with Andrews’ “right shoulder.” Andrews “bounced forward,” lost his balance, and then rotated and “came back” against the truck. At this point the truck driver could not have observed that Andrews was being pushed forward, as he was hidden from view by the hood of the truck. According to

Bowman, at no point did the security guards try to stop the truck.⁸

Steve Harrington is a licensed security officer and head of security for Personnel Support Systems, a business engaged in strike security work, employing security personnel including videographers and photographers. He described his duties during the strike, stating that his primary function was to ensure the safety of the pickets and the individuals entering the facility, as well as to protect the Respondent’s property.

On the morning of January 8, Harrington, from a distance of about 15 or 20 feet, observed one of the pickets, later identified as William Pace, carrying what Harrington believed to be a prohibited weapon, commonly referred to as an ASP, a collapsible black metal baton about 12 to 18 inches in length, with a small metal tip. It is, in effect, a small, collapsible billy club sometimes used by police officers.⁹ Pace became aware that the security guards had directed their attention to the object he was holding and, turning toward the security guards, slapped the object in his hand a couple of times while staring at them. He then proceeded to join the picket line, still with the object in his hand, and began walking with the pickets who carried picket signs. However, Pace carried only the ASP, sometimes slapping the object against the side of his leg as he walked.

Harrington testified that on prior occasions, apparently on preceding days, Pace had directed “numerous comments” to the security guards, stating that they would get their “ass kicked” if they stepped over the Respondent’s property line onto the roadway occupied by the pickets; and Harrington believed that Pace’s possession and provocative displaying of the ASP was a physical extension of his verbal threats.

According to Harrington, Pace observed that the security firm’s videographer had snapped some still photos of him holding the object, and Pace apparently decided that it was best not to have it openly displayed; he then pretended that it was concealed under his jacket and began taunting the security guards so that they would focus their attention on him by inserting his hand inside his jacket as if he were about to reveal it again. Meanwhile, Harrington had referred to his copy of the California Penal Code for the subsection of the provision dealing with the illegality of carrying or possessing such a weapon, as he was preparing to alert the police department to Pace’s conduct. But by this time, after about 5 or 10 minutes, Pace no longer continued to engage in this behavior and appeared to no longer be carrying the object. Therefore, without the object itself as evidence, and with Pace no longer carrying it, Harrington decided that notifying the police would not prove to be effectual.

William Pace began working for the Respondent in April 1984. By coincidence, on either the same day or the day prior

⁸ As pointed out by the Respondent, the videotape of the incident clearly shows that only Andrews had continued walking in front of the truck, and that all of the other pickets had stopped. Accordingly, it is clear that Bowman had not commenced to walk across the path of the truck with Andrews, and was not in close proximity to Andrews during the incident. Nor did Andrews ever state that the truck had grazed his right shoulder. Thus, the account of the incident given by Bowman is clearly erroneous.

⁹ Contrary to the testimony of other witnesses, below, Harrington testified that the object did not appear to be an umbrella shaft; neither did it appear to be a length of bamboo. Rather, there was no question in his mind that it was anything other than a weapon: either an ASP, which is a trade name for a particular brand of collapsible billy club, or some other brand of collapsible billy club.

to the incident in question, Pace gave notice to the Respondent that he would be retiring on January 31, 1997.

Pace testified that the object in question was not an ASP or billy club of any type, but rather was "a little plastic looking thing" that he found by the side of the road as he was picketing. He believed it was the shaft of an umbrella or something like that, as it was in a pile of debris that contained the remains of an old umbrella. It was a "beigish, brownish looking," object about an inch in diameter, "light like a feather," and did not appear to be collapsible; it had notches on it like a fishing pole. He carried it on the picket line about a minute or two, sometimes hitting his leg with it, and then threw it away. Pace admits that he "taunted" the guards "verbally," but did not do so on the day he was carrying the object. While Pace described his taunting of the guards as grabbing his crotch and shaking it at them, this is not verbal conduct, and Pace did not state what verbal taunts he engaged in. Pace, observing that the photographer was taking pictures of him and the guards were watching him, put his hand inside of his jacket and "was just playing with them, really," by posing for them as if he were going to remove the object from inside his jacket. Pace's Board affidavit states that he pretended to have a weapon or something under his coat just to tease the guards, as the guards kept taking his picture "like they were afraid of me or something."

On rebuttal, Pace testified that he was a mixer driver, a physically demanding job which he performed on a regular basis. However, he has a medical condition, gout, and is on medication for this condition which sometimes causes swelling on his right hand and, when the gout flares up, prevents him from griping and carrying anything heavy. Pace testified that he suffered a "serious attack" of this condition "along about" the time of the incident here, and thus would have been unable to carry any heavy object in his right hand.

Robert Mahoney, a good friend of Pace, testified that he recalled seeing Pace pick up what appeared to be something like a bamboo umbrella handle, about 12 to 16 inches in length, but without a hook on the end.

Denver King, who picketed with Pace, testified that he observed Pace carrying a small dark swagger stick or something while walking the picket line. On this occasion Pace remarked to King, in a light-hearted way, that he could get the guard to take his picture: Pace stuck his hand in his jacket and sure enough, the guard picked up the camera and started taking Pace's picture.

Mark Garza worked for the security firm as a photographer, videographer, and the evidence coordinator. Garza testified that he was 30 to 40 feet away from Pace and observed that Pace was holding an object that, by its length and particularly the rounded tip at its end, looked like an ASP. On seeing it, he radioed the people in charge and said that someone on the picket line was carrying an ASP. He was told to take videos and photos of the object. While he was trying to document the fact that Pace was engaged in such conduct, Pace was "playing games" with him, pretending to be hiding it in his jacket and then pretending to be pulling it out after Garza no longer had his camera in the ready position.

Gus Drulias, called as an expert witness by the Respondent, is currently the vice president of a private security firm and had previously been employed by the Los Angeles police department for almost 33 years. His rank was captain, and he was in command of a large precinct in Los Angeles country with some 450 officers. He is familiar with and has received training in

connection with collapsible batons, a weapon used for "pain compliance." Drulias testified at length regarding the geometry and purpose of collapsible batons, such as the ASP, one particular brand of such baton, which are primarily utilized by plain clothes officers. On reviewing the photo, received in evidence herei, of Pace holding the object, and the video of Pace walking with the object and slapping it against his hand and leg, Drulias testified that by its size, apparent heftiness, color, geometry, and tip, the object, in his opinion, was clearly an ASP or similar collapsible baton, rather than an umbrella handle, or lightweight length of plastic. Further, to purchase such a weapon it is necessary to have either police identification or a California guard card indicating that the purchaser has a license and the training to use such a weapon. Finally, Drulias testified that California Penal Code section 12020 governs the unauthorized possession or use of collapsible batons.

After the strike ended, Pace received a letter from the Respondent alleging that he had been observed with a weapon during the strike. The letter is as follows:

It has come to CalMat's attention that you were observed in possession of a weapon while picketing our Mission Valley facility. This is a very serious offense. CalMat believes that this act violated Sections 12020 and 12590 of the California Penal Code.

While CalMat believes that you committed this act, we are nonetheless interested in hearing any response that you wish to make regarding this charge.

Following receipt of this letter Pace, together with representatives of the Respondent and the Union, met at the Union's hall. Pace gave his version of the matter, and denied that the object was a weapon of any type.

On January 31, Pace went to the Respondent's premises to sign retirement documents and was given the following letter:

As you know, CalMat has been investigating the matter of your possessing a weapon while you were picketing our Mission Valley facility during your union's strike. Also, as you know, CalMat does not tolerate its employees possessing weapons and discharges employees for this offense.

Please be advised that CalMat concluded that you did in fact possess a blackjack-type weapon on January 8, 1997 at approximately 10:50 a.m. while picketing our Mission Valley facility. Although appropriate disciplinary action for this offense is discharge, as your retirement becomes effective today, any disciplinary action is untimely. However, please be advised that you are not eligible for rehiring at CalMat. Nor are you allowed on any CalMat property.

Harrington testified as follows regarding the incident involving Andrews on January 10. Immediately prior to that incident Harrington observed that one of the pickets had given a subtle but deliberate push to one of the security guards toward the front tire of one of the incoming vehicles as the guard was attempting to clear a path for the vehicle through the picket line.¹⁰ Voices were raised and Harrison rapidly moved from the Respondent's property into the street in order to diffuse a potential confrontational situation. Within a few seconds after

¹⁰ This is clearly depicted in the videotape while, simultaneously, someone warns, "Don't push!"

this incident another vehicle exited the Respondent's driveway. After coming to a brief but complete stop¹¹ it then moved forward and Harrington, as he stood directly in front of the truck, signaled for the truck to proceed through the wall of some 8 or 10 pickets who spread apart as the truck approached. Another security guard, Bauermeister, was also positioned on the other side of the truck, performing the same functions as Harrington. Harrington was backing up in sync with the forward progress of the truck when he observed, from his left side peripheral vision, that someone behind him (Andrews) was walking in the path of the truck. Harrington testified:

I put up my arms to stop the truck because all of [a] sudden Mr. Andrews wasn't moving any longer, he stayed in between the two of us and he turned, spun around backwards and pressed himself up against the grill of the truck.

Harrington testified that he did not observe that the truck touched Andrews before Andrews put his back to it, and believes that Andrews simply stopped walking, turned around, and slowly backed into the truck while the truck was moving forward. At this point Harrington put his fist up in front of the driver's face in order to get him to stop, but the driver, who was apparently looking for oncoming traffic and could not have easily seen either Harrington or Andrews.¹² Realizing that the driver was not going to stop, Harrington and the other security guard pulled Andrews out from in front of the truck so that he wouldn't get run over, and dragged him to the driver's side. According to Harrington, Andrews resisted the entire time, and when they released their grip he slapped his picket sign up against the truck, jumped on the running board and opened the driver's side door. Harrington and Bauermeister pulled him off the truck as he was grasping the metal door handle, which was sheared off the door as a result of Andrew's failure to release it, and fell to the ground.

On releasing Andrews Harrington felt the situation was over. But Andrews "took off chasing the truck" which had continued across the intersection. He jumped back on the running board and, not being able to open the door because the door handle had been broken off, started beating on the window. At this point several police officers pulled him from the truck, and seemed to be in control of the situation.

Jeffrey Dyer is director of labor relations for the Respondent. Dyer testified that on investigation of the conduct of both Andrews and Pace during the strike, including meetings with union representatives so as to provide the opportunity for Andrews and Pace to present their accounts of the incidents, it was concluded that neither Andrews nor Pace were credible in relating their versions of what had transpired. In fact, according to Dyer, the testimony of both Andrews and Pace at the hearing was inconsistent with the explanations they gave during the aforementioned union-management meetings, as exhibited by the notes that Dyer made during the course of the meetings. Dyer also examined the personnel files of both Andrews and

Pace for documentation of past disciplinary action.¹³ Thereupon, the Respondent determined that the discharge of Andrews and the action taken against Pace, who had retired were warranted under the circumstances, as their conduct, clearly violated established company rules which the Respondent had consistently enforced.

Analysis and Conclusions

I conclude and find that William Pace was indeed carrying a collapsible baton on the picket line on January 8, and that prior to that he had made threatening remarks to the security guards who were stationed at the Respondent's gate in order to protect individuals and property during the course of the strike. In this regard I credit all of the witnesses presented by the Respondent who testified that the object carried by Pace was such a weapon; that the possession of such a weapon by anyone other than a duly authorized law enforcement person is prohibited by law and is governed by criminal sanctions; and that Pace, in addition to carrying such a weapon, did utter threats of physical harm to nearby security guards. Conversely, I do not credit the testimony of any witnesses who testified that the object carried by Pace was an umbrella shaft, a bamboo or plastic stick, or any similar object.

The General Counsel contends that the security guards were not concerned with Pace's conduct, as demonstrated by the fact that they did not summon the police, and that Pace testified he was joking with them as he pretended to be concealing the object beneath his jacket. I do not agree. To the contrary, the evidence shows that the security guards were immediately concerned on observing that Pace had the weapon in his possession and was walking with it on the picket line; and they did in fact photograph him and were preparing to contact the police when they realized that without the weapon, which Pace appeared to no longer be carrying, the police would be unlikely to arrest Pace.

Further, the General Counsel contends that as the police were always nearby, the fact that they did not approach Pace to take a closer look at the object is evidence that they did not believe the object was an ASP or similar weapon. I disagree: The evidence shows that the police were not there on a continual basis and that the incident occurred over a brief period of time; therefore it has not been demonstrated that the police did in fact see Pace holding or carrying the object.

I further find that the Respondent was acting in good faith in evaluating the situation, and in determining that Pace's misconduct warranted the disciplinary action that the Respondent imposed on him. In this regard, Pace had no business with a weapon on the picket line and the only ostensible purpose for his possession and displaying of it would have been to intimidate the guards and/or those individuals passing through the picket line. There is no indication that Pace was singled out for discipline simply because he participated in the strike or engaged in other protected concerted activity. Accordingly, I shall dismiss this allegation of the complaint. *Clear Pine Mouldings*, 268 NLRB 1044 (1984); *Town & Country Nursing*

¹¹ This, too, is clearly depicted on the videotape, and I do not credit any witness who testified that in fact the truck did not stop.

¹² Thus, at that time Harrington was very close to the front of the truck and he was unable to make eye-contact with the driver because the bottom of the truck's windshield was higher than the top of his head and Andrews, leaning against the grill of the truck, was being pushed along at about bumper level.

¹³ Pace was given a warning on March 11, 1993, for a traffic incident, namely, pulling in front of a man on a motorcycle and running him into the curb and, after stopping, using profanity toward him, and a 1-day suspension on February 16, 1995, for having a "confrontation" with a customer and using "offensive immoral" language toward him. The warnings received by Andrews involved matters unrelated to the conduct in question here.

Home, 291 NLRB 74 (1988); *Keco Industries*, 276 NLRB 1469 (1985); and *Keco Industries*, 301 NLRB 303 (1991).

The General Counsel maintains that Rodney Andrews was hit, brushed, or grazed by a vehicle exiting the Respondent's premises as he was picketing, that he wanted to get out of the way of the truck but could not, and that his responsive reaction in attempting to physically bring the truck driver from the truck was therefore spontaneous and justified or excusable. I do not agree. Rather, I find that Andrews placed himself in front of the exiting vehicle by, after all the other pickets had stopped, continuing to walk purposefully in front of it, slowly, in order to cause it to slow down or stop. Andrews observed, I find, that in fact the truck did not pause for him. The driver, who had been given the signal to proceed, apparently believed that if Andrews continued across the truck's path he would clear the other side before the truck passed. When Andrews realized that he would be unsuccessful in slowing down the truck, he walked even slower and decided to turn his back to it and use himself as a barrier so the driver would have no choice but to stop.

Thus, I find, while Andrews could easily have walked out of the path of the slow-moving truck, he elected not to do so. Thereupon, it appears that the truck driver, who had been given the signal to proceed and was obviously preoccupied with the vociferous pickets crowding his truck on either side and with attempting to ease his large truck into a public intersection, was not aware of what was happening immediately in front of the cab of his truck which blocked his view. By his conduct Andrews put himself in jeopardy and also placed the security guards in jeopardy as they were trying to save him from serious injury.

I find that Andrews was not struck by the vehicle as he now claims, but rather became upset that he was pushed by the vehicle and then unceremoniously wrestled out of the way by the security guards. Thus, it is significant that immediately following the incident Andrews prepared a statement for his own purposes, and did not state that the truck struck him or that he had a problem with his knee. Further, the security guards, who were immediately in front of the truck on either side as they were guiding it out, and were closer to it than Andrews, were not struck by the truck. Finally, I do not credit Andrews' assertion that his knee was numbed up and that he was therefore unable to jump out of the way; the fact that he was able to free himself from the security guards, jump up on the running board, and attempt to bring the driver from the truck, and then to run after the truck, catch up with it, and again attempt to assault the driver, shows considerable dexterity and physical

ability, and strongly indicates that Andrews had no problem with his knee whatsoever.¹⁴

I further find that the Respondent, by discharging Andrews, was motivated by lawful considerations, and was not seeking to retaliate against Andrews for engaging in striking, picketing, or other protected concerted activity. Deliberately putting one's self in the way of physical harm and simultaneously jeopardizing those assigned to monitor the safety of all individuals in and around the picket line is itself clearly a justifiable ground for discharge. Moreover, under the circumstances, Andrews' two attempts to assault the truck driver and damage the truck, while perhaps spontaneous, was not justified and excusable whether spontaneous or not; thus, Andrews, by deliberately placing himself in harms way, created the ensuing scenario and is responsible for what transpired.¹⁵ Accordingly, I shall also dismiss this allegation of the complaint. *Clear Pine Mouldings*, supra.

On the basis of the foregoing, I shall recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not violated the Act as alleged.

On these findings of fact and conclusions of law, and on the entire record I issue the following¹⁶

ORDER

The complaint is dismissed in its entirety.

¹⁴ I do not credit the testimony of Lawrence Austin regarding his claiming to see the truck strike Andrews. The clear weight of the evidence shows, I find, that Andrews was not hit by the truck prior to turning his back to it.

¹⁵ Cf. *Meditate of New Mexico, Inc.*, 316 NLRB 629 (1995); Cf. *Meditate of New Mexico, Inc.*, 314 NLRB 1145 (1994); *Ornamental Iron Works Co.*, 295 NLRB 473 (1989); and *Franzia Bros. Winery*, 290 NLRB 927 (1988).

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.